United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

76-1504

76-1505

United States Court of Appeals
For the Second Circuit

B/S

UNITED STATES OF AMERICA,

Appellee,

v.

ROGER L. SPINELLI and JOHN J. DELUCIA,

Appellants.

On Appeal From The United States District Court
For The District Of Connecticut

APPELLANTS' JOINT REPLY BRIEF

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INTRODUCTORY STATEMENT

On December 10, 1976, this matter was consolidated, pursuant to Rule 3(b) of the Rules of Appellate Procedure, with the appeals of William Balog, Nicholas Lanese and William Lanese, Docket Number 76-1504. With respect to issues II and III set forth on pages 1 and 2 of the brief of the Appellants herein, inasmuch as they are being briefed and argued by the Appellants in Docket Number 76-1504, the Appellants, Roger L. Spinelli and John J. DeLucia, pursuant to Rule 28(e) of the Rules of Appellate Procedure, hereby adopt by reference those portions of the Appellants' brief and reply brief in Docket Number 76-1504 as pertain to those aforementioned issues.

Further, inasmuch as they have presented substantially identical motions and issues before the United States District Court, the Appellants, Roger L. Spinelli and John J. DeLucia, join in a single reply brief herein.

REPLY ARGUMENT

I THE MOTIONS TO SUPPRESS OF APPELLANTS, ROGER L. SPINELLI AND JOHN J. DELUCIA, WERE NOT PENDING AFTER OCTOBER 24, 1972.

As indicated in their brief (p. 19), the Appellants, Roger L. Spinelli and John J. DeLucia, filed motions to suppress on August 8, 1972, and August 22, 1972, respectively. Those motions were marked "OFF WITHOUT PREJUDICE" on October 24, 1972,[1] (Zampano, J.). On October 20, 1975, in hearing the Appellants' Motion to Dismiss under the Six Months' Rule, the court (Zampano, J.) specifically found that there "would be no motions pending as of the date when I stated that all motions were off." (emphasis added) (App. 314).

Despite the Appellants' motions to suppress being marked "OFF WITHOUT PREJUDICE", on October 24, 1972, and despite the court (Zampano, J.) specifically finding that after such a marking those motions were no longer pending under the Six Months' Rule, the government, in its brief, contends that such motions were pending until November 12, 1973.

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[1] Appellants' brief incorrectly states, at page 19, that such motions were marked "OFF WITHOUT PREJUDICE" on March 6, 1973. All motions not previously marked "OFF WITHOUT PREJUDICE", on October 24, 1972, or which were filed after such date were also marked "OFF WITHOUT PREJUDICE" on March 6, 1973. Appellants' motions to suppress were not marked "OFF WITHOUT PREJUDICE" both on October 24, 1972, and March 6, 1973, as suggested by the government at pages 6 & 7 of its brief.

A. The Appellants Did Not Waive the Six Months' Rule.

The government has contended that the Appellants waived the Six Months' Rule on November 12, 1973, when Attorney Flynn stated (App. 724a):

> Mr. Flynn: Your Honor, for the Court's -- protection of the Court, I believe the Second Circuit rule could be interpreted by some other lawyer at some other time to have some effect on my representations. For the record I respectfully ask the Court permission to waive the so-called Six Months' Rule as it has been implemented by the rules of this district.

The foregoing statement was made in regard to the government's motion to stay the proceedings pending the Supreme Court decision in Giordano and Chavez.

Unquestionably, that statement on the record was to waive the Six Months' Rule for the period of the stay only under the requirement of Rule 5(b)[2]. As Attorney Flynn prefaced his remarks,

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[2] "5. Excluded Periods.
In computing the time within which the government should be ready for trial under Rules 3 and 4, the following periods should be excluded:
(b) Periods of delay resulting from a continuance granted by the District Court at the request of, or with the consent of, the defendant or his counsel in writing or stated upon the record..." (emphasis added)

such statement was for the "protection of the court" under the Six Months' Rule. It was never intended, or interpreted by the government or the court[3] in the proceedings below, to be a waiver of any rights under the Six Months' Rule accrued as of November 12, 1973, the date of the stay.

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[3] It is interesting to note that the attorneys for the government below, who were personally familiar with the facts, never even suggested to the District Court that the Appellants waived the Six Months' Rule.

Further, it is apparent that the many erroneous factual assertions presented by the government for the first time in its appellate brief, have resulted from the fact that the government's appellate counsel was not personally involved in the lower court proceedings.

B. The District Court Did Not Find That Pretrial Motions Were Pending From August 8, 1972, until November 12, 1973.

The government states, at page 8 of its brief, that "the district court specifically found that pretrial motions were pending throughout the period from August 8, 1972, until November 12, 1973..." No such finding was ever made. On the contrary, the Court, on March 15, 1976, stated that "whoever reviews this case should review it on the cold record, because that's what /the appellants/ are entitled to." (App. 526). Clearly, on the record no motions of the Appellants were pending from March 20, 1973, until June 29, 1973, or from July 23, 1973, until November 12, 1973. (See Appellants' brief, page 9).

The District Court asked this Court to review this case on the cold record. That request was made after the District Court had made the following observations on March 15, 1976:

> THE COURT: The Court has some preliminary observations that it wishes to place on the record with respect to the Balog and Spinelli cases. (App. 508)
>
> . . .
>
> I recall numerous in chambers conferences with the attorneys. The attorneys were going in and out of this case -- these cases throughout their history. I remember particularly one long conference that I had with the attorneys in chambers and

> there was very little question in my mind that the Government's interpretation of what we were doing there in that period of time is the correct one.
>
> Now, with respect to the Balog case, I have no difficulty at all. I think even the bare record demonstrates that the Government is entitled to have the motion to dismiss denied. I think the record is much clearer in that case. The time spans are set out in the briefs and I do find that motion to dismiss in that case should be denied.
>
> Spinelli is more troublesome. But I find that again the Government's interpretation is the one I should adopt. While it is true that certain motions do not appear on the record to be pending, there is not the slightest doubt in my mind that whenever we talk in chambers that counsel assumed with the Court as well as with the Government that these motions were to be filed and I should know that.[4]
>
> (App. 510, 511)

Obviously, the District Court (Zampano, J.) predicated its ruling on the motion to dismiss on the assumption that counsel for the Appellant, Roger L. Spinelli, was present in the chambers conferences referred to above. In fact, counsel for the Appellant,

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[4] Although, as argued hereinafter, counsel for the Appellant, Roger L. Spinelli, was never aware of, invited to, or attended the chambers conferences referred to by Judge Zampano, it is clear that a motion to suppress was not "pending" under the Rules during the disputed period and that such motions "were to be filed". Referring to pages 20-21 of Appellants' brief, a motion becomes "pending" under the rule when it actually is filed and not from the time counsel contemplates its filing.

Roger L. Spinelli, was not present at such conferences as shown by the following colloquy that followed the remarks of the court referred to hereinabove:

MR. ROSNICK: May I make a few comments for the record on your rulings on the six month rule?

As far as Spinelli is concerned, I only recollect one conference with your Honor in chambers and that was subsequent to the decision in Giordano and Chavez and when you asked for lead counsel be appointed and any motions that the file be filed on a consolidated basis.

(App. 518)

THE COURT: Weren't you at the conference where we discussed for three hours --

MR. ROSNICK: Excuse me --

THE COURT: --what we were going to do with the signatures and depositions?

MR. ROSNICK: Excuse me, your Honor, there was also a conference where four or five counsel were present and the question of whether the signature was authenticated, and that again was subsequent to the Giordano and Chavez decision, and I think it was sometime in 1975.

THE COURT: One thing that is very distressing is when the Court has a recollection contrary to counsel's, and I respect your judgment, but I think we had that conference, we had more than one conference, and I remember having two or three conferences just on counsel for Mihigel.

MR. MEEHAN: Your Honor is correct.

THE COURT: Counsel were going in and out of my chambers during that period of time --

MR. MEEHAN: Your Honor is correct. What the problem is that I can remember being at several conferences in your chambers and not all counsel were there, so I think that --

THE COURT: As I say, I am not putting this onus on the defendants. In fact, of the three parties involved, the Court takes primary responsibility, the Government second, and the defendants are a very weak third as far as being responsible for the delay. So I am the first to take full responsibility for the fact that I did see counsel in chambers on occasion when Mr. Tarrant would say, "I have a couple of attorneys here in Balog and Spinelli, and I want to see you," and I am frank to confess I never did sit down and say, "Let's make notes," or, "Is every single attorney here present who has an appearance in the case?" and there may have been times when I assumed, perhaps wrongly, that certain attorneys were really handling the procedural aspects of these cases with the Court, and that there was no need to have each and every Court-appointed attorney here.

Whatever result I may have, and whatever effect that may have from a legal point of view, in my opinion, it's not enough to grant the motion to dismiss.

On the other hand, another forum may have a different view. That is why I am putting on the record that you may be right in your recollection. It's contrary to mine, but that may be because you weren't there.

MR. ROSNICK: For the record, if your Honor please, as counsel for Roger Spinelli, I think Mr. Spinelli has had a leading position in

this trial, and his counsel has had a lead position in this trial, and I believe I have attended every conference or every hearing on every motion that in any way pertained to Roger Spinelli. I don't believe I missed any conferences and again the only meeting with your Honor that I recollect or any meeting that I recollect with your Honor in chambers were following the Giordano and Chavez decision.

(App. 519-521).

Subsequent discussion on the record that day demonstrated that the chambers conferences prior to Giordano and Chavez decisions referred to by Judge Zampano did not even involve the Appellant, Roger L. Spinelli. (App. 523-525). Further, counsel for such Appellant was not present. (App. 525). Upon being informed that, in fact, counsel for the Appellant, Roger L. Spinelli, was not present at those chambers conferences as he had assumed, Judge Zampano, stated:

THE COURT: But in any event, Mr. Rosnick, you have every right to protect your client, and you are an excellent attorney, and I commend you for it. But I am sorry I do not have notes. I did not make notes myself.

Many times these conferences occurred when I was in the middle of a long case and I would see counsel on the spur of the moment.

On the other hand, it seems to me that it should not come down to your word against mine for a decision. I think in fairness to you, whoever reviews this case should review it on the cold record because that's what you are entitled to.

(emphasis added) (App. 525-526).

Clearly, the District Court did not find that the Appellant, Roger L. Spinelli, was bound by matters that took place without his knowledge or consent at chambers conferences that did not involve him. Rather, the District Court adopted the "cold record" as its finding. Based thereon, the Appellants, Roger L. Spinelli and John J. DeLucia, have accrued 268 and 300 days, respectively, under the Six Months' Rule.

C. Appellants Concede Six Months' Rule Tolled During Stay

At page 9 of its brief, the government states "appellants Spinelli and DeLucia in No. 75-1505 argue that delay during the time that Giordano and Chavez were pending in the Supreme Court resulted in a violation of the six month period provided by the Plan..."

That statement borders on the ridiculous. The appellants have always conceded, and do concede, that the Six Months' Rule was tolled during the period of the stay and no time during that period is claimed under such rule.

D. An "Off Without Prejudice" Marking Is Not The Same Marking As "Reserving Decision"

At page 17 of its brief, the government contends that a marking of a motion "off without prejudice" is the same marking as "reserving decision" Besides ignoring the clear meaning of the English language, that contention is contrary to the District Court's holding (Zampano, J.) that there "would be no motions pending as of the date when I stated that all motions were off." (App. 314)

E. The Court Did Not Postpone Argument On The Suppression Motions on October 24, 1972

At page 17 of its brief, the government contends that on October 24, 1972, "the court postponed argument on Appellants' suppression motion..." (emphasis added). The Court did not "postpone" those motions but rather marked them "off without prejudice". On July 23, 1973, the District Court (Zampano, J.) acknowledged that in order for the Court to consider suppression motions they would have to be "filed". (App. 676, 677) (See Brief of Appellants, Roger L. Spinelli and John J. DeLucia, page 20). Unless and until the Appellants filed motions to suppress after October 24, 1972, it is a certainty that the Court would not have and could not have considered them. [5]

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On September 25, 1972, (App. 82, 83) at a pretrial hearing, the Court, in colloquy with Attorney Meehan, made it perfectly clear that upon a motion being marked "off without prejudice" it would not be heard by the court until, and if, it was properly refiled:

THE COURT: You have filed a motion for bill of particulars?

MR. MEEHAN: Yes, I have, your Honor. And I filed a motion for discovery and a motion to dismiss.

THE COURT: Have you straightened out with Mr. Tarrant as far as discovery?

MR. MEEHAN: With the exception of one or two, your Honor. But could I just ask the Court this? It is agreeable to the Government, and I would like to have my motion to dismiss the indictment go off without prejudice at this time. And there is no objection by the Government. May that be done, your Honor?

THE COURT: All right.

MR. MEEHAN: Secondly, on the motion for discovery--

THE COURT: Well, just on the motion to dismiss-- in case you weren't here when we dealt with this earlier this morning -- those motions should be submitted within a week after the Government has complied with the disclosure. In other words, they are not going off with leave to renew at any time. They can be renewed within a week after the Government has complied with disclosure orders; so that once you see the basis for attacking the indictment you will file your motion.

...

Clearly, there could not be a suppression motion "pending" under the Six Months' Rule until it was filed.

F. No Discovery Motion Of Appellants Was Pending On November 12, 1973

At page 18 of its brief, the government incorrectly states that the attorney for Appellant, Roger L. Spinelli, acknowledged that his motion for discovery and inspection was still pending on November 12, 1973. However, such motion was not pending on November 12, 1973. It was granted on July 23, 1973. The only thing that Appellant's counsel acknowledge as pending was the government's court-ordered response to that motion. As argued in their brief at pages 21-22, the period wherein the government is attempting to comply with court orders for disclosure and production is not excluded from the Six Months' Rule.

It is perplexing to Appellants, Roger L. Spinelli and John J. DeLucia, when the government refuses to concede that their motions to suppress were no longer pending after October 24, 1972, when they were marked "off without prejudice". This is particularly so considering that the government, in companion case No. 1504, in fact conceded that no motions were pending therein after March 6, 1973, when motions were similarly marked "off without prejudice",

"The defendants next claim the period between March 6, 1973, and June 27, 1973, a period of 113 days (the defendants claim 111 days). While the Court, on March 6, granted a defense motion for an extension of time to file additional motions, which the government would argue further tolled the period under Rule 5(b), we have thus been unable to determine the extent of the requested continuance and, therefore, accept the period of 113 days as chargeable against the government." (App. 290, 291)

G. No Motion To Dismiss Of Appellants Was Pending On November 12, 1973

At pages 18 and 19 of its brief, the government states that the attorney for the Appellant, Roger L. Spinelli, indicated on November 12, 1973, that a motion to dismiss was still pending. That statement again completely ignores the record herein and the clear and unequivocal meaning of the English language.[6] In fact, no motion to dismiss had been filed as of November 12, 1973.

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[6] Footnote 10 at page 19 of the government's brief has put together statements that appear five pages apart in the record (App. 715, 720 and has thereby utterly distorted what actually transpired.

When counsel stated, "when the motion to dismiss eventually comes before the court -- which I suspect that it will ..." (App. 715), it was implicit (1) that no motion to dismiss was before the court at that time and (2) that there was no certainty that such motion would come before the court in the future.

It seems far-fetched for the government to now claim a motion to dismiss was pending on such date because counsel contemplated filing one.

Referring to page 723 of the Appendix, it is clear that the only motions pending at that time were the government's Motion For Discovery and Inspection dated August 23, 1973 (App. 766), Motion To Reconsider (App. 769), and Motion To Stay The Proceedings.

H. The Time For Trial Had Run Against All Co-Defendants Under The Six Months' Rule

Footnote 12, at page 20 of the government's brief, asserts, "At the very least, Piazza qualifies under Rule 5(e) as "a co-defendant as to whom the time for trial has not run." The government provides no basis whatsoever for that conclusion. In fact referring to the docket sheet herein (App. 727-732), from March 6, 1973 (all motions not ruled on marked "off without prejudice") until November 12, 1973 (proceedings stayed), Piazza had no motions pending before the court. Clearly, in that period of 251 days, the time for trial for Piazza had run under the Six Months' Rule. The Appellants reassert that indeed the time for trial had run under the Six Months' Rule as to each and every co-defendant in No. 76-1505. [7]

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[7] At page 21 of its brief, the government attempts to vitiate the court's own interpretation of its motion markings of "off without prejudice" of March 6, 1973, by quoting counsel for Piazza that he had a motion to suppress and a motion to dismiss pending on November 12, 1973. Again, the court found that a motion marking of "off without prejudice" meant that that motion was no longer pending.

I There Were No "Extraordinary Circumstances" Or "Good Cause" For The Delay

At page 22 of its brief, the government reaches the conclusions that "there were extraordinary circumstances that justified the delay" and that "there was good cause for delay under Rule 5 of the Plan".

Such conclusions were never reached by the District Court. More importantly, such conclusions are not supported by the record.

C O N C L U S I O N

The Appellants respectfully submit for the reasons stated in their joint brief, as well as herein, that they are entitled to a dismissal on the record under the Six Months' Rule. However, if this Court feels confused or in doubt about the underlying facts with respect to the Six Months' Rule issues, it is respectfully requested that it should vacate the judgment and

remand for a further hearing on Appellants' motion to dismiss and for specific findings in regard thereto. See United States v. Scafo, 470 F2d 748 (2nd Cir. 1972); United States v. Pollack, 475 F2d 828 (2nd Cir. 1973).

Respectfully submitted,

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STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 17 day of ~~March~~ Feb. 1977 deponent served the within Brief upon

Sidney M. Glazer, Esq.

attorney(s) for

Appellees

in this action, at

U.S. Dept. of Justice
WashingtoN, D.C. 20530

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this 17 day of Feb. , 1977

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978